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82-5902

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RUFUS EUGENE STEVENS,

Petitioner,

- v. -

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether petitioner's rights under the Eighth and Fourteenth Amendments were violated when, after a jury had convicted him of a capital crime, he was sentenced to death by a judge rather than by a jury.

2. Whether petitioner's rights under the Sixth and Fourteenth Amendments were violated when, after a jury had convicted him of a capital crime, the additional factual findings necessary to authorize the imposition of the death penalty: (a) were made by the judge rather than by the jury; and (b) conflicted with the factual findings of the jury, which had recommended life imprisonment.

Parties to the proceeding in the Supreme Court of Florida were:

The State of Florida and Rufus Eugene Stevens.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in this case on September 14, 1982.

OPINION BELOW

The opinion of the Supreme Court of Florida has not yet been officially reported. It is bound with this petition as Exhibit A to the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on September 14, 1982. On November 5, Justice Powell extended the time to file this petition until December 13, 1982. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . .

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

. . . nor shall any State deprive any person of life . . . without due process of law . . . .

STATUTE INVOLVED

Florida Stat. Ann. §921.141 (West Supp. 1982) is set forth in full as Exhibit B to the Appendix.

STATEMENT

Petitioner was convicted of a capital offense after a jury trial in the Circuit Court of the Fourth Judicial Circuit in and for Duval County in Florida. The evidence showed and the jury evidently found that on March 13, 1979, petitioner and one Scott Engle[1] entered an all-night convenience store and robbed one Eleanor Kathy Tolin, thereafter abducting, raping and murdering her.

At the conclusion of the trial, and pursuant to the provisions of the statute petitioner now attacks, a hearing was held before the trial jury at which evidence of "aggravating circumstances" —— the alleged rape of a fourteen-year-old girl —— was offered by the prosecution and challenged by a witness for petitioner. The jury was properly charged on its statutory task: to determine whether sufficient statutorily defined "aggravating circumstances" existed, to decide whether sufficient statutorily defined or other "mitigating circumstances" existed which "outweighed" the "aggravating circumstances" and then, "based on these considerations," to recommend whether petitioner "should be sentenced to life imprisonment or death." The jury recommended life imprisonment.

On the day of sentence, exercising the power granted him by the statute, the trial judge rejected the jury's recommendation and, finding that five "aggravating" and no "mitigating" circumstances existed,[2] sentenced petitioner to die.

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1. Engle, tried separately, was also convicted of a capital offense. There, too, a judge overrode the jury's recommendation of life imprisonment. Argument has taken place in the Supreme Court of Florida, but no decision has yet been rendered.

2. The five "aggravating" circumstances which the judge found are those set forth in subdivisions (d), (e), (f), (h) and (i) of subparagraph (5) of the statute.

The death penalty was affirmed by a four-to-two vote of the Supreme Court of Florida. This petition followed.

REASONS FOR GRANTING THE WRIT

A. Petitioner's Rights Under the Eighth and Fourteenth Amendments Were Violated When, After Having Been Convicted of a Capital Crime by a Jury, He Was Sentenced to Death by a Judge Since Such a Sentence Failed Adequately to Insure That Its Imposition Was Based Upon the Conscience of the Community

This petition deals with the law of eight states[3] and the lives of approximately thirty-three human beings.[4] Our fundamental proposition is that one convicted of a capital crime by a jury may not constitutionally be sentenced to death for that crime except by a jury, unless a jury sentence be

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3. Seven states give to a judge or group of judges the right to decide whether a defendant convicted of a capital crime after trial by jury should live or die. Four of the seven give to the judiciary that power absolutely, without assistance from a jury. See: Ariz. Rev. Stat. Ann. §13-703 (Supp. 1982); Idaho Code §19-2515 (1979); Mont. Rev. Code Ann. §§46-18-301 to 46-18-306 (Supp. 1981); and Neb. Rev. Stat. §§29-2519 to 29-2525 (1979; Supp. 1982). The remaining three of the seven —— Alabama, Florida and Indiana —— provide for an advisory jury (usually the trial jury) on the fatal issue, its decision not binding on the judge. See: Ala. Code tit. 13A, §§5-45 to 5-53 (1982); Fla. Stat. Ann. §921.141 (West Supp. 1982); Ind. Code Ann. §3550-2-9 (Burns 1979). One state permits a three-judge panel to impose a sentence of life or death if the jury is unable to agree unanimously on the appropriate penalty. See Nev. Rev. Stat. §§175.552 to 175.562 and 200.010 to 200.035 (1981).

4. Our inquiries have revealed that Florida's death row now holds thirty-three inmates who will confront the executioner not by a jury's decision but by that of a judge. We are unaware of how many others may be in the same position in the states listed in note 3 supra.

waived. Such a sentence exposes a capital defendant to the infliction of cruel and unusual punishment.

We recognize that jury sentencing is generally a most uncommon practice in this country,[5] and that at first blush it would therefore appear that it is we who have the great burden to sustain the constitutional imperative in capital cases of a sentencing procedure so rare. But death cases are different, as this Court has had occasion to note.[6] Where life itself is at stake, it is judicial sentencing which is most uncommon.[7] The "evolving standards of decency" which in part determine the meaning of "cruel and unusual punishment,"[8] clearly have evolved toward jury sentencing in capital cases.[9]

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5. See Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 15-16 and n. 59 (1980).

6. See, e.g.: Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, Stewart and Powell, J.J.); Furman v. Georgia, 408 U.S. 238, 286-91 (Brennan, J., concurring), 306-10 (Stewart, J., concurring), 314-71 (Marshall, J., concurring)(1972).

7. Only eight of the states which have a death penalty statute permit a judge to have the final word on the issue, and one of them does so only when a jury has been unable to agree unanimously on the appropriate sentence. See note 3 supra.

8. See, e.g., Trop. v. Dulles, 356 U.S. 86, 101 (1958).

9. Indeed, the preference for jury sentencing in capital cases is seen to be even more clear when it is noted that of the twenty-seven states which require such sentencing, all but one require a life sentence if the jury cannot agree. See Gillers, supra note 5 at 16.

A plurality of this Court stated, in Gregg v. Georgia, 428 U.S. 153, 184 (1976), that capital punishment may be justified when it is the "community's belief" that the crime was "so grievous an affront to humanity that the only adequate response may be the penalty of death."[10] And we have found nothing in any opinion of this Court which suggests a contrary view of what may justify a sentence of death. We respectfully submit, therefore, that a sentence of death may be constitutionally imposed only when the view of the community as to whether the defendant should forfeit his life for his conduct is reliably brought to bear upon the facts of the crime and the circumstances of the defendant. If that be so, then only a jury, unless one is waived, may constitutionally impose a sentence of death. Since the sentencing decision is predominantly, if not exclusively, a decision about whether retribution is warranted,[11] a jury is far more likely than a judge to make a decision reliably reflecting the conscience of the community. Our reasoning is as follows.

First, the jury selection process itself is calculated to see to it that the sworn twelve represent a fair cross-section of the community; there may constitutionally be no systematic exclusion by virtue of race[12] or sex.[13]

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10. See also the reference to the "conscience of the community" in Chief Justice Burger's dissenting opinion in Furman v. Georgia, supra note 6 at 388.

11. See Gillers, supra note 5 at 53-56.

12. See, e.g.: Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Jury Comm'n, 396 U.S. 320 (1970).

13. See, e.g.: Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

On the other hand, the overwhelming majority of judges who may be called upon to impose a death sentence are white males with a far better than average income, education and intellect —— hardly what could be called a "fair cross-section of the community."[14]

Second, that same process is also calculated —— by means of the voir dire and the exercise of challenges for cause and peremptory challenges —— to remove from the final jury those whose views are at either extreme of the issue as to when the death penalty should be imposed. With rare exceptions, neither side in a capital case may cause the disqualification of the judge, even when his views on the death penalty are so extreme as would have disqualified or caused the excusal of any juror who held them.[15]

Third, the very nature of the jury system permits the almost-anonymous juror to vote his conscience on the death penalty without pressure by his or her peers. The clearly-visible judge, on the other hand, who may soon be facing

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14. In Florida's Fourth Judicial Circuit, for example, there were twenty-two Circuit Court judges at the time of petitioner's trial. See 53 Fla. Bar J. #8 (Sept. 1979), p. 566. Of those twenty-two, only two (9%) were women and only one (4-1/2%) was black. Women comprised 52% and blacks 22% of the total population of the Circuit in 1980. See United States Bureau of Census, 1980 Census of Population and Housing: General Population Characteristics for Florida, Table 45. The same disparity exists in Florida as a whole. There are some 339 Circuit Court judges of whom eighteen (5.4%) are women and eight (2.4%) are black. Women comprise 52% and blacks 14% of the entire population. See Ibid, Table 18.

15. Anthony Lewis has reported that shortly after this Court's rejection in Furman v. Georgia, supra note 6, of the nation's death penalty statutes as they then existed, a Florida judge demonstrated his view of the case by publicly throwing a hangman's noose over the limb of an oak tree in front of his courthouse. Lewis, "Cruel and Unusual," The New York Times, October 21, 1982, p. A31, c. 1-2. That such a "hanging judge" might override the community's view, as expressed by a jury's advisory life sentence, and order a defendant to be executed, is constitutionally intolerable and does not even give the appearance of justice.

re-election[16] or re-appointment, may find it difficult to withstand pressures on him to favor death over life in a given case or class of cases.

Fourth, empirical studies have shown that when judges and jurors disagree on whether a defendant convicted of a capital crime should live or die, the judge is far more likely to opt for death than the jury.[17] In Witherspoon v. Illinois, 391 U.S. 510 (1966), this Court held unconstitutional a jury selection system which made it far more likely that the jury —— which had the final word on life or death would vote in favor of the ultimate punishment rather than extend mercy. We submit that, although different considerations are involved in the two issues, the principles involved in that case and this are basically the same. Having struck down a system which weighted the odds against a defendant at the very start of a capital trial, this Court should do the same with a procedure with a similar effect at the very end.

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16. Florida Circuit Court judges are elected for six-y terms.

17. The Florida statistics, as set forth in Gillers, supra note 5 at 67-68 and n. 318, illustrate the point with particular relevance. Moreover, we have been advised by those in Florida who have followed such cases closely that, since the enactment of the statute petitioner now challenges some seventy-two jury recommendations of life imprisonment have been overridden by the trial judiciary, which has reduc jury death recommendations on only approximately fifteen occasions. Those figures are striking. We submit that with such great judge-jury disparity on what the conscience of th community has to say about the fate of one convicted of a capital crime, it is almost certainly the judges, not the ju who have misread the will of the community.

of the trial.[18]

We respectfully submit, therefore, that this Court should grant the petition and rule whether the statute violates the Eighth and Fourteenth Amendments.[19]

B. Petitioner's Rights Under the Sixth and Fourteenth Amendments Were Violated When, After a Jury Had Convicted Him of a Capital Crime, the Additional Factual Findings Necessary To Authorize the Imposition of the Death Penalty: (1) Were Made by the Judge Rather Than by the Jury; and (2) Conflicted With the Factual Findings of the Jury, Which Had Recommended Life Imprisonment

This petition involves considerations under the Sixth Amendment as well as under the Eighth. It is our fundamental proposition that when, in order for a capital

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18. One would think that a Florida judge's override of a trial jury's recommendation of a life sentence would be a relatively rare event, since the Supreme Court of Florida, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), stated that in order to justify an override, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." But such has surely proven not to be the case, unless one is prepared to believe that, since 1972, some seventy-two carefully-chosen capital juries have included a majority of jurors reasonable enough to be selected, hear the evidence and find the defendant guilty but who became unreasonable when deliberating during the penalty phase of the trial.

19. It is perhaps worth noting that the statute was the Florida legislature's response to this Court's decision in Furman, supra note 6, although it is clear that Furman did not require judicial sentencing after the recommendation of an advisory jury. Prior to Furman, a Florida defendant convicted of a capital crime would be sentenced to death unless the jury, by a majority vote, recommended life imprisonment. Immediately after Furman, the current statute was passed, ostensibly to comply with the dictates of that case. See Gillers, supra note 5 at 44 n. 207. Ironically, absent Furman and the Florida legislature's misinterpretation of it, petitioner would not now be on death row.

defendant to be sentenced to death, there must be a finding of certain "aggravating" facts not included in the definition of the capital crime itself, then that finding must be made by a jury rather than by a judge. Our reasoning follows.

First, the so-called "penalty stage" of the trial, which involves, either with or without the reception of additional evidence, a determination as to whether certain "aggravating" or "mitigating" circumstances exist, is as much of an adversary procedure as is the culpability stage. Indeed, where guilt is clear but proper punishment is not, it may be a more hotly-contested portion of the trial than any other. In Bullington v. Missouri, 451 U.S. 430, 446 (1981), this Court noted that it had already held "that many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing similar to that required by Missouri in a capital case." The Court cited Specht v. Patterson, 386 U.S. 605, 608 (1967), as a case in which various due process rights such as counsel, confrontation and the presentation of favorable evidence, were held available at a hearing at which the sentence might be determined based upon "a new finding of fact . . . that was not an ingredient of the offense charged." The statute petitioner challenges here creates a sentence procedure much like the Missouri one mentioned in Bullington and involves the imposition of sentence based on new facts, like the sentencing procedure referred to in Specht. We submit that it would be anomalous indeed for this Court to refuse to add to the list of due process rights available to a defendant at such a crucial hearing the right described in Duncan v. Louisiana, 391 U.S. 145, 149

(1968), as "fundamental to the American scheme of justice."[20] There, at stake because a judge decided facts, rather than a jury, was sixty days in jail and a fine of $150; here, it is petitioner's very life.

Second, this Court has consistently held that an accused is entitled to a jury determination of all factual issues on which his fate depends. See, e.g.: Sandstrom v. Montana, 442 U.S. 510, 523 (1979) ("factfinding function" in a criminal case "the law assigns solely to the jury"); United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977) ("in a jury trial the primary finders of fact are the jury"). Here, however, petitioner never got a true jury trial on the critical statutory issues whether "aggravating" circumstances existed and whether "mitigating" circumstances existed which outweighed the "aggravating" circumstances. It was upon the resolution of those issues —— clearly factual —— that petitioner's life depended, yet the Florida statute permitted the judge, rather than the jury, to resolve those issues, and thus violated his right to a jury trial. For that reason, this Court should condemn the Florida procedure just as the Supreme Court of Oregon, In Banc, unanimously struck down an Oregon procedure which had a similar defect in State v. Quinn,

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20. Duncan also described an accused's right to have the facts decided by a jury as: one of "the most essential rights and liberties of the colonists" (p. 152); a further protection against the "arbitrary action" of the judiciary (p. 156); "an inestimable safeguard against . . . the compliant, biased, or eccentric judge" (p. 156); "a defense against arbitrary law enforcement" (p. 156); and a result of our society's "reluctance to trust plenary powers over the life and liberty of the citizen to one judge or to a group of judges" (p. 156).

50 Or. App. 383, 623 P.2d 630 (1981).[21]

Finally, the record in this case demonstrates that the judge imposed the sentence of death not only in reliance upon the existence of "aggravating" circumstances never passed upon by the jury but, of far greater importance, in reliance upon the absence of "mitigating" circumstances which the jury clearly found to exist and found to outweigh the "aggravating" circumstances. A brief recitation of the facts is necessary to make our point.

Immediately after the culpability stage of the trial ended by the jury's verdict of guilt, the penalty stage began. The jury heard two witnesses (pro and con) on the factual issue whether petitioner had previously raped a fourteen-year-old girl.[22] The prosecutor then summed up, going through the statutory list of "aggravating" and "mitigating" circumstances. He specifically told the jurors that there were a number of the former upon which the State did not rely, and included in that category items (e) and (f), thereby removing from the jury's consideration whether the capital crime had been

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21. There, after the jury found the defendant guilty of capital murder, the definition of which did not include the concept of deliberation, the trial judge, pursuant to the statute, made a factual determination that defendant had acted deliberately and the judge was therefore authorized to impose a sentence of death, which he did. Oregon's high court held that the defendant had thus been denied his right to trial by jury under the Constitution of Oregon. We respectfully submit that Oregon's constitutional right to a jury trial is no different —— and surely no stronger —— than that enshrined in the Sixth Amendment.

22. This inquiry was relevant to prove the absence of mitigating circumstance (a) —— "the defendant has no significant history of prior criminal activity."

committed to avoid arrest or for pecuniary gain.[23]

After having been accurately charged on the meaning of the penalty statute, the jury deliberated and then recommended a life sentence. That recommendation clearly meant that they had found as a fact that one or more "mitigating" circumstances existed and, further, outweighed whatever "aggravating" circumstances they had found to exist.

On the day of sentence, the trial judge not only found the existence of "aggravating" circumstances —— including the two which the prosecutor had withdrawn from the jury's consideration —— but also found, despite the jurors' opposite finding, that there existed not a single "mitigating" circumstance. The record shows, therefore, not merely a judge-jury disagreement as to the penalty appropriate to a given set of agreed-upon facts —— a disagreement which might cause only Eighth Amendment problems —— but a fundamental disagreement as to the facts upon which the statute made petitioner's life depend. We respectfully submit that petitioner had a Sixth Amendment right to have those crucial facts resolved solely by a jury of his peers.[24]

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23. Annexed hereto as Exhibit C to the Appendix are the pertinent pages of the prosecutor's penalty stage summation. See p. 1, l. 17 to p. 2, l. 3.

24. Lest it be argued that the judge-sentencing provision of the statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976), we note that the issue was not involved in the case, since the advisory jury had in fact recommended death. Moreover, two years later, this Court, in Lockett v. Ohio, 438 U.S. 586, 609 n. 16 (1978), stated it need not reach Lockett's "contentions that the Constitution requires that the death sentence be imposed by a jury . . .;" it did not state that the issue had already been resolved by Proffitt.

CONCLUSION

For the foregoing reasons, the writ requested should be granted.

Dated: New York, New York
December 13, 1982

Respectfully submitted,

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